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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 689.

FREEMAN J. THOMSON, ADMINISTRATOR OF THE ESTATE OF ARTHUR W. THOMSON, DECEASED, PETITIONER,

VS.

CAROLINE THOMSON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

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SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

A.

The United States Circuit Court of Appeals for the Eighth Circuit reversed a judgment of the United States District Court at Kansas City in favor of Petitioner in

an interpleader proceeding against the parties hereto instituted by John Hancock Mutual Life Insurance Company.

Caroline Thomson and Arthur Thomson were married on July 17, 1930 (22). About June 15, 1938, the district manager of said Insurance Company called at their home, interviewed both. He called their attention to various types of life insurance contracts (65), Mr. and Mrs. Thomson participating in the discussion.

Mr. Niman, as a witness for Mrs. Thomson, testified that: "During the course of the interview they decided to buy the contract." During the interview the district manager asked a question contained in the application for insurance:

> "Do you want to reserve the right to change the beneficiary?"

and the answer given was

> "Yes" (71).

The district manager, wrote into the application the answer "Yes" (71).

When the policy was issued, it was issued with that provision in it (71). The insurance company promised that on the death of the insured, subject to the conditions and provisions thereof, and while it was in force, it would pay the sum of $20,000 to

> "Caroline Thomson, wife, if living, or to such other beneficiary as may be finally substituted under the conditions hereof or if no such beneficiary be then living then to the executors or administrators of the insured."

The policy also provided:

> "Change of Beneficiary. If the right has been reserved, the Insured, unless there be an existing

assignment of this policy, may change the beneficiary from time to time by written request upon the blanks of the Company filed at its Home Office, but such change shall take effect only upon endorsement hereon."

On February 12, 1940, the following endorsements were made on said policy:

"This certifies that on February 3, 1940, The Estate of the Insured was nominated as revocable beneficiary under this Policy, subject to all its provisions, and subject also to any existing pledge or assignment thereof.

John Hancock Mutual Life Insurance Company,
By Charles J. Diman,
Secretary.

Dated at Boston, Mass. February 12, 1940." Stamped across the above endorsement "SEE SUBSEQUENT ENDORSEMENT."

"The Assignor by an absolute assignment dated Feb. 5, 1940, revokes any nomination of beneficiary heretofore made and any method of optional settlement heretofore elected under this policy.

John Hancock Mutual Life Insurance Company,
By Charles J. Diman,
Secretary.

Dated at Boston, Mass. Feb. 12, 1940."

The policy contained the following recital:

"Policy and Application the Entire Contract — This policy and the application therefor constitute the entire contract between the parties * * *

dated at Boston, Massachusetts, this Fifteenth day of JUNE, 1938. * * *."

The district manager further testified that Arthur Thomson, the deceased husband, stated that he wanted his wife named as beneficiary so that she could be paid for services rendered in connection with his business, and that this statement was made during the interview in which Arthur Thomson, in his wife's presence, informed the district manager that he desired to reserve the right to change the beneficiary.

Mrs. Thomson was herself a party to the insurance contract and bound by its provisions, and especially by the provision reserving the right to Mr. Thomson to change the beneficiary. The district manager for the insurance company, Niman, testified to facts showing that both Mr. and Mrs. Thomson were parties to the insurance contract and bound by all of its provisions and that she consented to the inclusion of the reservation of the right in the policy reserving the right to Mr. Thomson to change the beneficiary.

Mrs. Thomson was also present when the policy was delivered by the district manager (67), for the insurance company, who also testified that the contract was actually made with both Mr. and Mrs. Thomson, as follows (65):

> "A. The agent had made an appointment for me to call on Mr. and Mrs. Thomson. I called upon them at their apartment at the Berkshire Hotel and discussed with them various types of contracts, and the merits of the contracts, and so forth, and Mr. Thomson decided that he was interested in the twenty year endowment contract and he discussed the twenty year endowment contract with his wife, who was present at the time, and between them they decided that that is the type of a contract they were going to buy if they bought, and during the course of the interview they decided to buy the contract, * * *"(65).

Mr. Thomson, according to the district manager, called on him about February 3, 1940, to make arrangements for a loan and to use the policy as security. The district manager then told deceased that his wife must consent. The husband, according to the district manager, suggested that he did not want her to know anything of the matter, and thereupon the district manager advised deceased that he must change the beneficiary, and name his estate as beneficiary, thereby revoking the nomination of his wife as beneficiary (70) on the forms provided by the Insurance Company.

In accordance with these suggestions the change of beneficiary was made. The policy was assigned to the Mercantile Bank as security for a loan.

On June 26, 1944, marital differences having arisen between them (129, 74), the Thomsons went to the office of an attorney in Illinois and employed him to file a divorce action and prepare a property settlement. The property settlement contract contained the following (15):

> "That the parties hereto hereby agree that each of them is hereby wholly and forever barred of and from all rights, claims and demands in and to the property of each other, real, personal or mixed, wheresoever situated, and whether now possessed by the said parties or hereafter acquired by them, including the rights of dower and homestead."

A decree of divorce was granted on August 1, 1944, the decree embodying the terms of the property settlement, which decree contained the following recital (17):

> "* * * and that said parties be and each of them is hereby wholly and forever barred from all right, claim or demand in and to the property of each other, real, personal or mixed, wheresoever situated, * * *."

Petitioner's interplea relied on said property settlement and said decree of divorce adjudicating the parties' property rights as *res judicata* (14-17).

Mr. Thomson thereafter died on December 4, 1944, while indebted to the Bank for the sum of $5,746.84.

On May 2, 1945, the Insurance Company filed its interpleader petition in the United States District Court for the Western District of Missouri at Kansas City.

On May 21, 1945, petitioner filed his answer and interplea (7-17). Caroline Thomson, on August 13, 1945, filed her first amended answer and interplea (18-20). On September 26, 1945, petitioner filed his reply (20).

The cause was tried before the Hon. Albert A. Ridge, District Judge, on October 24, 1945, and on November 15, 1945, the court rendered a decree sustaining the interpleaders complaint and later finding the issues for petitioner, made findings of fact (22-24) and conclusions of law (24-26), and on December 15, 1945, rendered judgment in favor of petitioner for the balance due on the Policy, $14,951.50.

At the trial petitioner's counsel stated (35):

> "Mr. Hartz: Then if your Honor please, this policy is, I presume, in evidence, it is part of the petition and will be considered in evidence.
>
> The Court: It will be so considered."

The following recital is found on page 120 of the record:

> "It is hereby stipulated and agreed that the foregoing is a full, true and complete transcript of the record and proceedings in the cause of *John Hancock Mutual Life Insurance Company, a corporation*, v. *Caroline Thomson, and Freeman J. Thomson, administrator*, No. 3189, and the same is hereby approved.

Approved this 15th day of March, 1946.
Harry A. Hall,
Attorney for Appellant.
Harvey E. Hartz,
Attorney for (Respondent)."

The certificate of the Clerk of the District Court is to the same effect. But the contract or policy of insurance to which Mrs. Thomson was a party and on which she relied as a basis of her claim is not included in the record.

The complaint filed by the John Hancock Mutual Life Insurance Company alleges (3):

> "That said original policy is filed herewith, marked 'Exhibit A' and made a part hereof."

That "Exhibit A" is nowhere shown in the record, but on page 5 are the words "(Policy Exhibit 1)," which is evidently substituted for "Exhibit A."

Included in the instrument described as "Policy Exhibit 1" are asterisks, and some of the provisions of the policy which asterisks establish omissions from the contract (Webster's Int. Dictionary).

B.

STATEMENT AS TO JURISDICTION.

Mrs. Caroline Thomson filed her notice of appeal in the District Court on January 22, 1946 (27), and on July 26, 1946, the Circuit Court of Appeals rendered the judgment (135-136) reversing the judgment of the District Court with costs, which judgment also contained the following provision (136):

> "And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to enter judg-

ment in favor of Caroline Thomson for the proceeds of the policy deposited in Court by the John Hancock Mutual Life Insurance Company.

July 26, 1946."

A petition for rehearing was filed in accordance with the rule of the Circuit Court of Appeals, and was overruled on September 3, 1946.

The opinion of the United States Circuit Court of Appeals for the 8th Circuit is reported in 156 F. 2d 581, and at pages 125-135 of the Record.

The statutory provision which is believed to sustain the jurisdiction of this Court is the following: Sec. 347, 28 U. S. C. A., providing:

> "(a) In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal" (Which said statute in its present form was adopted February 13, 1925, 43 Stat. 938).

The judgments of the District Court were judgments which rested for their foundation upon the contract of insurance involved. It was embodied in and was a part of the alleged but non existing contract between Mrs. Thomson and her deceased husband. The burden was upon Mrs. Thomson, as appellant, to include the entire contract of insurance in the record in the Circuit Court of Appeals if she desired to have said Circuit Court try the case *de novo* or to review the evidence in the case with reference to said contract and to reverse the District Court judgment and direct the entry of a judgment for Mrs. Thomson.

The decision of the Circuit Court of Appeals is, therefore, in conflict with the decision of this Court in *Red River Cattle Company of Texas* v. *Alfred Sully*, 144 U. S. 209. It is also in conflict with the decision of another Circuit Court of Appeals, to-wit: that of the Circuit Court of Appeals of the District of Columbia in *Berger* v. *Smith*, 32 F. 2d 423, Certiorari Denied 280 U. S. 557, holding that unless the instrument on which the judgment of the trial court was based is included in the record, the appellate court is without jurisdiction to do otherwise than affirm the judgment.

The decision of the Court of Appeals is also in conflict with the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, requiring the Federal courts, in diversity of citizenship cases, to apply the law of the State in which the federal court sits: *Guaranty Trust Co.* v. *York*, 326 U. S. 99. And in the case at bar, the right to change the beneficiary in the insurance policy, reserved by petitioner as a part of the alleged agreement with Mrs. Thomson, was a property right under the law (*Grigsby* v. *Russell*, 222 U. S. 149; *McKinney* v. *Ins. Co.*, 270 Mo. l. c. 315).

That right was adjudicated and determined against Mrs. Thomson by the decision of the Illinois divorce court shown in the record (14-17), to which decision the District Court was compelled to give *res judicata* effect under the decision of the Missouri appellate court in *Paper Products Co.* v. *Life Insurance Co.*, 204 Mo. App. 527, and under the full faith and credit clause provision of the United States Constitution, and under the decisions of this Court in *Russell* v. *Place*, 4 Otto 606, and *De Sollar* v. *Hanscome*, 158 U. S. 216.

This Court has jurisdiction to review this case on certiorari for the reason that the facts and the law authorize this Court to review same in the exercise of its

sound judicial discretion; and the reasons for review, as shown by the record, are special and important; and the record herein discloses that clauses (a) and (b) of Paragraph 5 of Rule 38 are directly applicable to the questions here involved and justify a review.

The decision herein is in conflict with the decisions of the ten circuits on the questions here involved, which questions here involved are of such importance that it is in the public interest to have them decided by this Court under the rule stated by Chief Justice Taft in *Magnum* v. *Coty*, 262 U. S. 159:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

C.

THE QUESTIONS PRESENTED HEREIN ARE:

A.

Whether or not a Circuit Court of Appeals has jurisdiction to reverse a judgment of a District Court, and thereupon to try the case *de novo* on the record before it when it affirmatively appears from the record that an instrument or contract which is the basis of the litigation, and the basis of the judgment of the District Court, is not included in the record in the Circuit Court of Appeals.

B.

Whether or not a Circuit Court of Appeals may reverse a judgment of the District Court and render a new judgment in favor of the losing party in the District Court,

when the evidence which was before the District Court is not included in the record before the Circuit Court of Appeals.

C.

Whether or not the agreement of a beneficiary in an insurance policy that the insured shall have the right to change the beneficiary can be excluded by the Circuit Court of Appeals from its consideration on appeal, and ignored by it in its decision when it makes a finding that the insured made a contract with the beneficiary not to change the beneficiary, notwithstanding the very policy which both parties agreed should be the policy which the Insurance Company should issue after some two hours' discussion and consideration thereof, and thus and thereby deprive the petitioner of that which was the property of the insured, to-wit: his right to change the beneficiary in an insurance policy which he owned, notwithstanding a decree of a court having jurisdiction forever barred any claim by Mrs. Thomson to any property or property right of her deceased husband.

D.

Whether or not a judgment rendered by a District Judge, after a trial between claimants to the balance due on an insurance policy in an interpleader proceeding wherein the only relief sought by the contesting parties is an award of the balance of the insurance money deposited with the Clerk, and wherein the issues rest upon oral testimony of witnesses who testified in the presence of the District Judge, may be reversed by a Circuit Court of Appeals, which Circuit Court of Appeals did not have the advantage of seeing and hearing the witnesses testify.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Circuit Court of Appeals was without jurisdiction to reverse the decision of the District Court for the reason that respondent Caroline Thomson, as appellant in the Circuit Court of Appeals, failed to include the policy of insurance on which the action was founded in the transcript of the record presented to that court. The decision of the Circuit Court of Appeals is therefore in conflict with the decision of this Court in *Red River Cattle Company of Texas, plaintiff in error, against Alfred Sully*, 144 U. S. 209, wherein this Court said:

> "The Chief Justice: The only errors assigned which might call for consideration depend upon the terms and the construction of a contract which does not appear in the record.
>
> *The judgment is therefore affirmed*" (Italics Court's).

II.

The decision and opinion of the Circuit Court of Appeals is in conflict with the decision and opinion of the United States Circuit Court of Appeals for the District of Columbia in *Berger* v. *Smith*, 32 F. 2d 423, Certiorari Denied by this Court in 280 U. S. 557, holding that where the instrument which is the basis of the action is not included in the record, it cannot be considered.

III.

The Circuit Court of Appeals was without jurisdiction to try the case *de novo* and to reverse the judgment of the District Court and to direct the District Court to enter a judgment for Caroline Thomson, since it appeared from the face of the record before it that all of the evidence adduced before the trial judge was not included in the transcript of the record before the Circuit Court of Appeals, and the decision and opinion of the Circuit Court of Appeals is therefore in conflict with the many decisions of this Court, and the courts of all the other circuits, and the general law on said subject.

Blease v. *Garlington*, 92 U. S. 1.

IV.

The decision of the Circuit Court of Appeals holding that the District Court erred in failing to find the issues for Mrs. Thomson is in conflict with the decisions of the Courts of the State of Missouri, and of this Court and the other circuit courts of appeal, in holding that Mrs. Thomson had a contract with Arthur Thomson, her husband, by virtue of which he bound himself to keep the insurance in force, notwithstanding it appears that Mrs. Thomson agreed, as a part of the alleged agreement that Mr. Thomson should reserve the right to change the beneficiary in the policy, and that Mr. Thomson exercised the right so given to him by the terms of the policy, and to which right to change Mrs. Thomson agreed at the time both parties agreed to accept said policy with said provision written therein, and at the time Mr. Thomson was alleged to have made the statements on which the Court of Appeals based its judgment.

V.

The Circuit Court of Appeals overlooked the fact that the jurisdiction of the District Court was based alone on diversity of citizenship, and that for said reason the District Court was merely another court of the State, under the decision of this Court in *Guaranty Trust Company* v. *York,* 326 U. S. 99, and that the decision of the District Court was in accordance with the law of the State of Missouri, and that the decision of the Court of Appeals is in conflict with the law of the State of Missouri on the question, as expressed in the opinion of the Missouri appellate court in *Kinney* v. *Insurance Company,* 270 Mo. 305, l. c. 315, and *Dunavant* v. *Mountain States Life Insurance Company,* 67 S. W. 2d 785, and therefore in conflict with the decision of this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

VI.

The evidence offered by Mrs. Thomson, by her witness the district manager, disclosed her agreement, at the time the contract of insurance was made, that her alleged contract with deceased embodied the agreement that Mr. Thomson should have the right to change the beneficiary, and that said provision, with her knowledge and consent, was written into the policy therein issued to Mr. Thomson. Said right of Mr. Thomson to change the beneficiary was a property right, which property right was included in and was amongst the rights of property referred to in the property settlement and in the decree of divorce. The decision and opinion of the Court of Appeals is therefore in conflict with the decision of the Missouri appellate court in *Paper Products Company* v. *Life Insurance Company,* 204 Mo. App. 527, and the decisions of this Court in *Russell* v. *Place,* 4 Otto 606, and *De Sollar* v. *Hanscome,* 158 U. S. 216.

VII.

The opinion of the Circuit Court of Appeals is in conflict with the general law on the question stated in Sec. 1724 of 4 C. J., as follows:

> "(Sec. 1724) (4) Instrument Sued on or Involved. If the instrument sued on is to be examined by the court on appeal, it must be made a part of the record by a bill of exceptions, or in some other legitimate way; otherwise it cannot be considered, and it is not made a part of the record by the clerk's recital of it, or by being indorsed on the declaration, although where actions are brought under certain statutory provisions such instrument becomes part of the pleading. But papers do not become a part of the record by being filed with the pleadings, in conformity with a statutory provision which does not make them a part thereof. Simple profert of an instrument, without oyer, does not make it a part of the record. But when oyer of the instrument is given it becomes part of the pleading; and if profert is in fact, although unnecessarily, made, and oyer craved and given, the instrument becomes a part of the record.
>
> "Presumption in favor of judgment. If the instrument which is the foundation of the action is not so incorporated, every reasonable intendment must be indulged in favor of the judgment of the court being in accordance with its terms." *Greco* v. *Haff*, 63 F. 2d 863.

VIII.

Mrs. Thomson was a party to the contract and bound by its terms, including the provision giving Mr. Thomson the right to change the beneficiary; and consequently, whatever right Mrs. Thomson might have was a right subject to the terms of the contract of insurance to which she was a party.

The decision of the Circuit Court of Appeals is, therefore, in conflict with the decision of the Supreme Court of Missouri in *McKinney* v. *Insurance Company*, 270 Mo. 305, l. c. 315, where the court decided that "a contract provision which entitled the insured to change the beneficiary" in an insurance policy "is as broad as its terms and no broader, and hence it must be construed according to the terms and stipulations expressing it in a given case." And further held that "the power to exercise it is measured by the language on which it is founded," and that whether that right "arises by convention or from the nature of the insurance, the beneficiary to be affected by its exercise has a conditional interest only in the policy proceeds, while the power to change such beneficiary continues to exist."

IX.

The decision of the Circuit Court of Appeals is in conflict with the decision in *Caffery* v. *John Hancock Mutual Life Insurance Company*, 27 Fed. 25, l. c. 28, holding that "the beneficiary is bound by the contract entered into between the insured and the company."

X.

The decision of the Circuit Court of Appeals is in conflict with the opinion of this Court in *Bank* v. *Hall*, 101 U. S. 43, and in conflict with *Equitable Life Ins. Co.* v. *McElroy*, 83 Fed. 638 (C. C. A. 8), where Sanborn, J., said:

> "The subject matter of a policy of insurance is the life insured. The parties to it are the insurance company, on the one hand, and the beneficiaries on the other. The parties to a contract are as important as the subject matter and parties cannot be imported

or substituted upon one side of a contract without the consent of those on the other. *Bank* v. *Hall*, 101 U. S. 43, 51."

XI.

The judgment of the District Judge was based upon the oral evidence of witnesses and the insurance policy which was the basis of the litigation. The only issue to be determined between the parties hereto was who was entitled to a judgment for the balance due on the insurance policy, the proceeds of which were deposited with the Clerk of the District Court. The judgment of the District Judge was supported by substantial evidence, part of which was oral, and was binding on the Circuit Court of Appeals, which court was without jurisdiction to try the case *de novo*, especially since all the evidence before the District Judge was not before the Court of Appeals.

XII.

The stipulation at page 120 should have been construed by the Circuit Court of Appeals with reference to its subject-matter and in the light of the surrounding circumstances, including the facts appearing in the transcript of the record, which record shows that the insurance contract, which was the basis of the litigation and part of the alleged contract on which Mrs. Thomson based her claim for relief—and so construed, it is apparent that said stipulation was based on mistake, or inadvertence, and the Court of Appeals should have found and disregarded said stipulation, which was, as shown by the record, untrue and the parties could not by a stipulation give the Circuit Court of Appeals jurisdiction not conferred on it by Section 225, Title 28, U. S. C. A., which was wholly appellate.

CONCLUSION.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this court, directed to the United States Circuit Court of Appeals for the 8th Judicial Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the 8th Circuit and of the case numbered and entitled on its docket No. 13330 Civil, *Caroline Thomson, Appellant,* v. *Freeman J. Thomson, Administrator of the Estate of Arthur W. Thomson, Appellee,* to the end that the cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment of the United States Circuit Court of Appeals for the 8th Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated November 7th, 1946.

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

No. 689.

In the Supreme Court of the United States

October Term, 1946.

FREEMAN J. THOMSON, Administrator of the Estate of ARTHUR W. THOMSON, Deceased, *Petitioner*,

vs.

CAROLINE THOMSON, *Respondent*.

PETITIONER'S REPLY TO RESPONDENT'S SUGGESTIONS IN OPPOSITION TO WRIT OF CERTIORARI.

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

In the Supreme Court of the United States

October Term, 1946.

FREEMAN J. THOMSON, Administrator of the Estate of ARTHUR W. THOMSON, Deceased, *Petitioner,*

vs.

CAROLINE THOMSON, *Respondent.*

APPELLANT'S REPLY TO RESPONDENT'S SUGGESTIONS IN OPPOSITION TO WRIT OF CERTIORARI.

No. 689.

PRELIMINARY STATEMENT.

Respondent's suggestions have necessitated this reply, showing that Exhibits "A," "B" and "C" are parts of the omitted policy of insurance which was before the trial

court but not before the Circuit Court of Appeals, and that said omitted parts contradicted respondent's witnesses.

Exhibit "A."

Exhibit "B."

"If the policy is payable to a revocable beneficiary, loans will be made upon the sole signature of the Insured."

Exhibit "C."

RELEASE OF ASSIGNMENT.

NOTICE

"This release of assignment does not renominate or reinstate any beneficiary or beneficiaries prior to the date of the assignment."

State of Missouri, County of Jackson—ss.

Harvey E. Hartz, of lawful age, being duly sworn, upon his oath states:

That Exhibit "A", hereto attached, is a photostatic copy of the part of the policy consisting of the application referred to in the testimony of the District Manager for the John Hancock Mutual Life Insurance Company.

That Exhibit "B" is a part of said insurance policy with reference to loans.

Exhibit "C" appears on that part of the insurance policy attached thereto and entitled "Release of Assignment."

Harvey E. Hartz

W [illegible] IT

Application for Insurance to the John Hancock Mutual Life Insurance Company of Boston, Massachusetts.

Part A — Statements to Company's Agent 3095799 FORM 100-0-56

99

1. Name of applicant. (Print) ARTHUR - W - THOMSON

2. Address for premium notices. (Print) No. 4000 HOLMES - ST. City or Town K.C. State MO

Present address if different from above. BERKSHIRE HOTEL KC MO

3. Date of birth: Month MAY Day 11 Year 1902 Age and birthday last birthday 57

4. What is your present occupation? State exact duties. SALESMAN

5. Name and address of employer. SELF.

6. (a) Have you ever taken a flight in any type of aircraft either as pilot or passenger? (a) NO

(b) Do you contemplate taking aerial flights either as pilot or passenger? (If either answer is yes, give full particulars on reverse side.) (b) NO

7. Do you intend to reside or travel outside the United States or Canada? If so, state for how long, when, where, and for what purpose. NO

8. Have you ever applied for a policy of life insurance which has not been issued by the said form and amount applied for or upon which an additional premium charge has been imposed by reason of age or otherwise? (If so, state when, where and result.) NO

9. Is this application intended to replace other insurance now in force in this or any other Company? (If so, name Company and give full particulars.) NO

10. Amount of Life Insurance, Disability Benefit, Double Indemnity, and Accident and Health Insurance, in force, pending or contemplated on my life. (Enter amounts in spaces provided.) NO

Name of Company	Life Insurance In Force	Plan	Year Issued	Pending or Contemplated	Total Amount	In Force	Pending or Contemplated
NONE					Monthly Income Disability Benefit		
					Waiver of Premium Only Disability Benefit		
					Double Indemnity in connection with Life Insurance	NONE	
					Double Income Accident and Health Insurance		

11. Form of policy applied for: 20 YR. ENDW.

12. Amount: $20,000

13. Do you desire Total and Permanent Disability Benefit providing for Waiver of Premium? YES

14. Do you desire Double Indemnity Benefit? YES

15. Do you desire Supplementary Provision for Family Income? If answered yes, state how many ..... years. (Insert 10, 15 or 20) NO

16. Premiums to be paid: Annually / Semi-Annually / Quarterly. Total Amount of Premium: $1049.80

17. Have you paid (Yes or No) the premium? NO. Amount paid: $ NONE

18. Dividends to be applied under Option (Here whether (A) to cash, (B) to reduce current premium, (C) left on deposit or (D) to purchase paid-up additions.) NOTE: Option D not applicable to Term Policies.

19. State whether Married, Single, Widow, Widower. MARRIED

20. Non-forfeiture Provisions to become effective in event of non-payment of premium. (Strike out provision not desired.) Extended Term Insurance. Reduced Paid-Up Insurance.

21. Name of beneficiary. (Print) CAROLINE - THOMSON

22. Its Relationship to applicant. WIFE Age 28

23. Do you reserve the right to change the beneficiary from time to time? YES

It is agreed that, unless otherwise provided, any policy issued hereunder shall be payable to the executors or administrators of the insured, if no insured beneficiary is living at insured's death, or if payable to a certain beneficiary, that the Company shall not be liable for the application of the proceeds by such beneficiary, or for insured by any legal means, and that the applicant reserves and may exercise all rights and powers under the policy without notice to or consent of such revocable beneficiary, except as otherwise provided.

Home Office Endorsements (Not to be filled in by Agent)

Dues 11 to end option C

I (We) hereby apply for the insurance described above and agree: A. That the foregoing statements and answers which I have made, and which with Part B of this application shall form the basis of the contract of insurance, are complete, true and correctly recorded. B. That if payment of the premium above stated has been made with this application, the insurance hereby applied for shall be subject to the terms and conditions of any policy issued hereunder; if the application is approved at the Home Office of the Company, shall be in force from the date of the completion of Part B of this application, provided, that the Company shall be entitled that on said date I was insurable in accordance with its rules for the amount and plan of insurance applied for without any medical examination; that if payment of the premium has not been made with this application, any policy which may be issued hereon shall take effect only if and when delivered or have mailed by a physician since the date of Part B, and then only in the event that it shall be delivered to and actually received by me, [illegible] of health and habits since the date of Part B, and that whether the premium is paid with the application or otherwise, the insurance hereby applied for shall be subject to the terms and conditions of the policy and of all its conditions. C. That a receipt on the form attached hereto is the only receipt the agent is authorized to give for any payment made before delivery of the policy; that only the President, a Vice President, the Secretary or an Assistant Secretary can make, modify or discharge any of the Company's rights or requirements, that notice to or knowledge of the soliciting agent or the medical examiner or any other person, except as specifically provided herein as to or knowledge of the Company and that neither such agent or medical examiner is authorized to accept risks or to pass upon insurability. D. That the foregoing statements are covenants by the Company in this application, the Company is authorized to amend this application by making the change in the [illegible] and I hereby agree that any acceptance of any premium hereof on this application as amended shall constitute a ratification of such amendments, but no change shall be made as to amount, classification, plan of insurance, or benefits unless agreed to in writing by me. E. [illegible] the date of this application, it is not approved as aforesaid, or if the Company does not give notice of action thereon, the application shall be

Dated at Mo. A Thomson x Arthur W Thomson

Applicant's Signature

[illegible]

Subscribed in my presence and sworn to before me this 29th day of November, 1946.

Thos. M. Dant.

Notary Public, Jackson County, Missouri.

My commission expires March 13, 1948

I.

On pages 3 and 4 of respondent's suggestions the claim is that while the policy was attached as an exhibit to the interpleader's petition, it is no part of the record; that it was never formally introduced as an exhibit by either party and then the mistaken stipulation appearing at pages 6-7 of the petition for certiorari is again reproduced on the erroneous theory that parties by stipulation may confer a jurisdiction which the law denies. The record contradicts said erroneous claim (34, 35, 36). It contains the following:

"Mr. Hartz: I presumed you would introduce the policy in evidence.

The Court: The policy is a part of the petition and made a part of it as an exhibit (34).

* * * * * *

Mr. Hartz: Then, if Your Honor please, the policy is, I presume, in evidence, it is a part of the petition and will be considered in evidence (35).

The Court: It will be so considered (36).

Mr. Hartz: Yes. Then under the policy and under this designation of beneficiary the estate is designated as the beneficiary for this money. Now, she is claiming this, regardless of this designation, and in my opinion she should proceed with her testimony, because under the policy we are entitled to it, the face of the policy, we are entitled to this money." (36.)

Thus the policy (with its attached papers) was not only formally but substantially introduced in evidence and fully considered by the trial court in connection with the oral evidence contradicted by it. Furthermore, Rule 10 of the Federal Rules of Civil Procedure provides:

> "A copy of any written instrument which is an exhibit to a pleading *is a part thereof for all purposes.*"

See also official form 3, definitely confirming that statement. So that the policy was duly introduced in evidence and was part of the record.

The district manager of the John Hancock Life Insurance Company testified in great detail on October 24, 1945, as to the alleged conversations had on May 24, 1938, about seven and one-half years before (126). That conversation was the only basis for the finding by the Circuit Court of Appeals set forth in its opinion (126) that

> "His (deceased's) net income was approximately $15,000.00."

and the principal basis for the decision of the Court of Appeals.

But the application attached to the policy and part thereof offered in evidence discredits the evidence of Mr. Niman.

Mr. Niman's evidence on that subject is (65):

> "I then asked him the questions on the applications and one of the questions was 'What is the estimated annual income or net worth of the applicant?' I told him I had to answer that question, would he supply the answer; he said, 'Oh, $15,000.00 or in excess thereof, a year.' I noted that on the application, concluded the sale." (65.)

Exhibit "A," the photostatic copy of the application attached to and made part of the policy, directly contradicts the witness, for it contains no such statement. Thus the witness was discredited in the trial court. The parts of the policy dealing with "loans" marked Exhibit "B" provides:

> "If the policy is payable to a revocable beneficiary, loans will be made on the sole signature of the Insured."

The law of Missouri authorizes the insured to change the beneficiary where he reserves the right so to do without the consent of the beneficiary.

The first Missouri Supreme case referred to in the opinion of the Court of Appeals on page 132 of the record is *Fendle* v. *Ray*, (Mo.) 58 S. W. (2d) 459. It says, l. c. 464:

> "* * * if the right to change the beneficiary is reserved in the policy, the insured may make the change without the consent of the beneficiary (*Robinson* v. *Ins. Co.*, 168 Mo. App. 259) * * *"

The wealth of State and Federal cases there cited on the point demonstrates that the manager knew that it was not necessary to have the beneficiary's consent to the change, and that fact discredited the district manager as a witness in the trial court.

Another part of the policy entitled "Release of Assignment," under the heading "Notice" contained the following legend:

> "This release of assignment does not renominate or reinstate any beneficiary or beneficiaries nominated prior to the date of the assignment."

The Circuit Court of Appeals, l. c. 133-134, not having the benefit of said provision, likened the policy in this case to a deed given to secure a loan upon the theory that it was really a mortgage.

Had said statement as a part of the policy been included in the record, the Court of Appeals could hardly have come to the conclusion that it was proper to treat the policy under the evidence on the same theory that a deed given to secure a loan is construed by a court of equity.

It is true that the parts of the policy not included in the record are referred to herein only because they are verified copies of parts of the policy so offered in evidence and made part of the record only for the purpose of demonstrating the wisdom of the rule that requires an appellant in an equity case who would have the court try the case *de novo*, to include all the evidence before the trial chancellor in the record if he would have the circuit court of appeals try the case *de novo*.

The question here involved is simply a question of jurisdiction which could not have been conferred on the Court of Appeals by stipulation.

Respondent claims that (2):

> "* * * the chief complaint is a criticism of the conclusions reached by the court *upon the evidence in the case* * * *"

The trouble with that contention is that petitioner's complaint is that the Circuit Court of Appeals reached its conclusions on the *part of the evidence* respondent chose to include in the record contrary to the conclusions reached by the trial court upon *all the evidence in the case*—both including *that which was not before the Court of Appeals* and that which was.

The claim that the policy was not the basis of the judgment, even if sustained, did not relieve respondent of the burden of including the policy in the record, or give the Appellate Court jurisdiction to try the case *de novo*, since the witnesses testified with reference thereto, and were contradicted thereby, and the face of the record establishes its omission therefrom and the lack of jurisdiction to try the case *de novo*.

II.

An appellate court in England, Missouri, or the Federal Courts, cannot and never could try an equity case *de novo* on appeal unless the same evidence be before the appellate court which was before the trial court. And so the judgment of the Circuit Court of Appeals is void for lack of jurisdiction, which could not be conferred by consent.

This Court, in *Atlas Life Ins. Co.* v. *Southern Co.*, 306 U. S. 565; *Sprague* v. *Ticonic Bank*, 307 U. S. 161; *Henrietta Wells* v. *Rutherford County*, 281 U. S. 121, and *Waterman* v. *Canal-Louisiana Bank & T. Co.*, 215 U. S. 33, l. c. 43, points out that, in this sort of case, the jurisdiction and practice of the Federal Courts is like that of the "High Court of Chancery in England at the time of the adoption of the judiciary act of 1789." The practice in that High Court, on the identical point here involved, is shown by the opinion in *Sir John Eden, Bart., et al.* v. *The Right Honorable John Earl of Bute et al.*, VII Brown's Parliamentary Cases 204, 208. The opinion says:

> "The cause being at issue, witnesses were examined on both sides, and on the 9th of December, 1773, the cause was heard before the Lord Chancellor Bathurst;"

The case was then referred to a Master to approve a lease, pursuant to the agreement with usual covenants.

"Soon after pronouncing this decree, the respondents preferred a petition to the Lord Chancellor, stating, that they had several proofs taken in the cause, and several exhibits to be read, which they found by the Register's minutes were not entered as read; and that there was no direction given for entering the proofs and exhibit as read, which they were advised was very material to be done."

* * * * * * *

"On the 21st of January, 1774, this petition came on to be heard, when his Lordship was pleased to order, that the evidence on both sides should be entered as read; and that the minutes should be rectified, according to the prayer of the petition." (l. c. 205.)

* * * * * * *

"From so much of this order, as directed the evidence to be entered as read, the present appeal was brought; and on behalf of the appellants it was argued, that the decree on the hearing of the cause, was the judgment of the Court on the construction of the agreement; and that the agreement itself, with such part of the evidence as had been read by the plaintiff, was all that was then before the Court. That no evidence was at that time offered on the part of the respondents, in support of the construction which they contended for; and if any had been offered it would have been objected to, great part of it being totally inadmissible. That the purport and nature of the evidence, was not on the hearing of the cause, or on the respondents petition, either read or stated to the Court. That upon the hearing of all appeals from an inferior to a superior Court this principle universally prevails, that no evidence can be received which was not laid before the Court below; *nor can any evidence which was received*

below, be objected to above, **unless the admission of improper evidence be among the points of the appeal: For if it were otherwise, the superior Court, instead of determining on the rectitude of the decree appealed from, would be exercising an *original,* not an *appellate* jurisdiction; and might appear to be imputing errors to the Court below, where there was no pretence that any had been committed. It is not indeed unusual to rectify minutes, taken at the time of pronouncing a decree, where something which realy passed, and ought to have been entered, has by mistake been omitted. But the objection in the present case was, that the order, though founded on a petition to rectify the minutes, applied to a point in which the minutes were not wrong, but clearly right; and the entering this evidence as read, was not conformable to, but *directly against the truth of the case.* There may have been instances, where, with a view to save time, evidence *which has been stated on one side, admitted on the other, and judged of by the Court,* has been entered as read, though it was not actually read at the hearing; but an order to enter evidence as read, which was not read, nor at all in the consideration of the Court, at the time of pronouncing the decree, was conceived to be without precedent. And if, on the hearing the appeal in this cause from the Lord Chancellor's decree, the evidence on both sides was to be gone into, a case would be laid before the House, totally different from that which was before his Lordship."**

The other side admitted that:

"The parol evidence had not been read, because the opinion of the Court in the respondents favour, was given upon the argument itself; it was therefore unnecessary to read proofs in confirmation of that opinion." (l. c. 207.)

The High Court of Parliament sustained said contention and

> "* * * it was ordered and adjudged, that the order complained of, so far as it directed the evidence on both sides to be entered as read, should be reversed." (l. c. 207-208.)

That rule thus formulated has been followed by the Federal Courts throughout the years. It establishes lack of jurisdiction by the Circuit Court of Appeals to try the case *de novo*, or to do otherwise than to affirm the decree of the District Court. It has been applied by this Court and by the Missouri courts.

The Missouri courts (*St. Louis County* v. *Sparks*, 11 Mo. 201, l. c. 203) follow the rule applied in *Eden* v. *Bute*, *supra*, stating that rule as it is set forth in said case and in the Federal Courts. Thus:

> "The section of the statute which is relied on to sustain this appeal from the County to the Circuit Court, confers appellate jurisdiction only. Such jurisdiction does not impart a right to try the case anew, or on any other evidence than that which was before the court below. Otherwise, the jurisdiction would not be appellate, but original." Citing *Eden* v. *Bute*.

To the same effect see *Maplegreen Co.* v. *Trust Co.*, 237 Mo. 350, and *Maplegreen Realty Co.* v. *Trust Co.*, 237 Mo. 365, in which cases the court held that the parties could not, by agreement, give the appellate court jurisdiction to try the case *de novo* without bringing the evidence before the trial court into the record on appeal.

The rule authorizing designation by each party as to the part of the record to be sent to the Appellate Court made the stipulation superfluous and unnecessary.

The unnecessary stipulation warrants the application of the maxim "*Clausulae inconsuetae semper inducunt suspicionem*" and "is itself a badge of fraud." (*Baldwin* v. *Whitcomb*, 71 Mo. 659.)

It evidently imposed on the Court of Appeals, and hence its judgment cannot stand (*Hazel Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238).

An appeal in an equity case does not vacate the decree (*Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185), nor give the Appellate Court the same jurisdiction to try a case *de novo*, as in an admiralty case (*Irvine* v. *The Hesper*, 122 U. S. 256).

Had the case been tried by the trial judge when he was a state judge at the court house three blocks away, his judgment could not be disturbed on appeal unless the respondent took the entire record to the highest court of the state.

Does not the decision of the Circuit Court of Appeals conflict with the decision of this Court in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, since this was a diversity case wherein the decision in the state court three blocks away would have been final under the facts in this record?

Since the Court of Appeals was without jurisdiction to do otherwise than affirm the judgment of the District Court, the writ should be granted.

Respectfully submitted,

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 689.

FREEMAN J. THOMSON, ADMINISTRATOR OF THE ESTATE OF ARTHUR W. THOMSON, DECEASED, PETITIONER,

VS.

CAROLINE THOMSON, RESPONDENT.

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SCHULTZ & BODNEY,
WHITE & HALL,
HARRY A. HALL,
Attorneys for Respondent.

Table of Cases Cited

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VS.

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RESPONDENT'S SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner's application for Writ of certiorari to reverse the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this cause (reported in 156 F. 2d 581) fails to present any legal grounds for the issuance of the Writ.

Ordinarily certiorari is issued by this court to the Circuit Courts of Appeals for two reasons, first, to secure uniformity of decisions between the courts of the various circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court.

In *Magnum* v. *Coty*, 262 U. S. 159, 67 L. Ed. 922, 43 S. Ct. 531, this court expressed the rule thus, l. c. 532:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Since the decision of this court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, conflict of opinion on questions controlled by state law no longer serve as grounds for the issuance of the Writ. As stated by this court recently in *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 58 S. Ct. 860, l. c. 861.

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

Obviously none of the grounds enumerated in Rule 38 of this court are present in this case and there is no contention whatever that the issues presented are those of great public interest.

A study of the petition discloses that the chief complaint is a criticism of the conclusions reached by the court upon the evidence in the case, although it is well established that certiorari will not be granted to review the evidence or inferences drawn thereon.

General Talking Pictures Corporation v. *Western Electric Company*, 58 S. Ct. 849, 304 U. S. 175, 82 L. Ed. 1273.

Muschany v. *U. S.*, 65 S. Ct. 442, 324 U. S. 49.

The Questions Presented Do Not Justify the Issuance of the Writ.

Points A and B of the petition (10) are based upon the claim that the policy itself was not printed in full in the record, and that this deprived the court of appeals of jurisdiction.

This argument is clearly untenable for several reasons. In the first place no such claim was ever presented to the Circuit Court of Appeals. It is axiomatic that this court will not determine issues nor decide questions which were not dealt with by the court of appeals.

Owens v. *Union Pacific Railroad*, 63 S. Ct. 1271, 319 U. S. 715, 87 L. Ed. 57.

Sonjinsky v. *U. S.*, 57 S. Ct. 554, 81 L. Ed. 772, 300 U. S. 506.

Burnet v. *Commonwealth Improvement Co.*, 53 S. Ct. 198, 287 U. S. 417, 77 L. Ed. 1139.

The fact is that the policy was not the basis of the litigation nor respondent's claim since there was no dispute as to it or any of its terms. The insurance company paid the money into court without dispute and respondent's contentions were appropriately stated by the court of appeals in the second paragraph of the opinion as follows (R. 125):

> "It was contended by appellant, Caroline Thomson, in the trial court, and she renews the contention here, that an oral contract was entered into between her and the insured, by the terms of which she acquired a vested interest in the proceeds of the policy, which could not as between her and the insured be taken from her by his act."

The policy was attached as an exhibit to the interpleader petition filed by the insurance company, but was

never formally introduced in the record as an exhibit by either party. As a matter of fact, however, the record on appeal was prepared as it was, upon full consultation with counsel for petitioner and with his full approval, and he so stipulated as follows (R. 120):

> "It is hereby stipulated and agreed that the foregoing is a full, true and complete transcript of the record and proceedings in the cause of *John Hancock Mutual Life Insurance Company, a corporation,* v. *Caroline Thomson, and Freeman J. Thomson, administrator* No. 3189, and the same is hereby approved."
>
> (Signed) Harry A. Hall,
> Attorney for Appellant.
>
> (Signed) Harvey E. Hartz,
> Attorney for Respondent.

In this connection it is interesting to note that the only provisions of the policy relied upon by the petitioner here, are exactly the same provisions which were incorporated by agreement in the record, and which were fully considered by the court.

Point C (11) made by petitioner is that the court erroneously construed the policy whereas, there was no such issue in the case. The opinion of the court clearly is not founded on any construction of the policy and petitioner made no claim of error in this regard in that court.

Section D (11) questions the court's construction of the evidence which is not within the purview of the writ of certiorari. The record clearly shows that the evidence was duly considered by the court, and showed the respondent's equitable right to the policy proceeds was virtually undisputed and conclusively established.

The further complaint of conflict of opinion with that of other Circuit Courts of Appeals is without foundation,

and an examination of the opinion conclusively establishes this fact. This claim was first made in a Supplemental Motion for Rehearing filed by petitioner, with respect to two cases (143), *Doering* v. *Buechler,* 146 F. 2d 784 (8th C. C. A.), and *Rawls* v. *Penn Mutual Life Insurance Co.,* 253 Fed. 725 (5th C. C. A.). Such claim has apparently been abandoned since neither of these cases have been mentioned in the petition for certiorari. In other words, the conflict now claimed was never presented to the Circuit Courts of Appeals. As a matter of fact, a review of the decisions cited show that there is no conflict and the cases are not even remotely in point.

The final claim is that the court's opinion is in conflict with the opinions of the Missouri Courts and is likewise untenable. No such claim was ever made prior to the filing of this petition, and the cases cited by the petitioner clearly show no conflict exists. Actually the court's opinion is in full accord with the rulings of the Missouri Courts on this point, and in fact the court followed and approved *Chapman* v. *McIlwrath,* 37 Mo. Sup. 38, decided by the Missouri Supreme Court upon almost identical facts.

The same rule was approved by the Missouri Court in *Fendler* v. *Roy,* 58 S. W. 2d 459, 331 Mo. 1083.

In conclusion we respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

SCHULTZ & BODNEY,
WHITE & HALL,
HARRY A. HALL,
Attorneys for Respondent

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 689

FREEMAN J. THOMSON, ADMINISTRATOR OF THE ESTATE OF ARTHUR W. THOMSON, DECEASED, PETITIONER,

VS.

CAROLINE THOMSON, RESPONDENT.

MOTION FOR ORDER DIRECTING STAY OF MANDATE.

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

FREEMAN J. THOMSON, ADMINISTRATOR OF THE ESTATE OF ARTHUR W. THOMSON, DECEASED, PETITIONER,

VS.

CAROLINE THOMSON, RESPONDENT.

MOTION FOR ORDER DIRECTING STAY OF MANDATE.

To the Honorable Associate Justice Wiley Rutledge, Assigned to the Eighth Circuit, or to Any Other Justice of the Court:

Your Petitioner Respectfully States:

On September 3, 1946, the United States Circuit Court of Appeals for the Eighth Circuit in the case of

Caroline Thomson,
Appellant,

v. No. 13330.

Freeman J. Thomson,
Administrator of the
Estate of Arthur W.
Thomson,
Appellee,

overruled a petition for rehearing.

That the judgment rendered by the United States Circuit Court of Appeals was a judgment reversing a judgment of the District Court in an interpleader suit, in which said District Court found the issues for petitioner and awarded him the sum of $14,951.50.

That, under the law of Missouri, it is the duty of petitioner as administrator to prosecute all suits on behalf of the estate, and that in the performance of said duty said petitioner files this motion.

On September 10, 1946, petitioner filed a motion in said Circuit Court of Appeals praying order to stay mandate, which motion is as follows, caption omitted:

> "Now comes appellee, Freeman J. Thomson, Administrator of the Estate of Arthur W. Thomson, deceased, and respectfully states that it is his intent to attempt to have the record in the above entitled cause reviewed on certiorari by the Supreme Court of the United States.
>
> That, to enable him so to do, it is necessary that an order staying the mandate in this case be made and entered of record.
>
> Wherefore, appellee prays that this Court order that the mandate in the above entitled cause be stayed for the period authorized by the Acts of Congress in such case made and provided, so that appellee may

have an opportunity to prepare and file a petition for certiorari in the Supreme Court of the United States.

Harvey E. Hartz,

Attorney for Appellee."

Said motion was sustained and the mandate ordered stayed until October 24, 1946.

That thereafter, and on or about October 14, 1946, petitioner mailed to the Clerk of the United States Circuit Court of Appeals the following motion in said cause, praying an order to extend the stay of mandate, which motion, caption omitted, is as follows:

"Now comes appellee and respectfully states that additional counsel has been consulted in connection with appellee's attempt to have the record in the above entitled cause reviewed by certiorari by the Supreme Court of the United States and that the petition and supporting brief are not yet prepared.

Wherefore, Appellee prays that the Court order that the mandate in the above entitled cause be further stayed for the period authorized by the Acts of Congress in such case made and provided, so that appellee may have an opportunity to avail himself of the services of said additional counsel to prepare and file a petition for certiorari and supporting brief in the Supreme Court of the United States."

Harvey E. Hartz,

Attorney for Appellee."

That accompanying said motion was a letter signed by Harvey E. Hartz to the Clerk of the said Circuit Court of Appeals, which letter is in words and figures as follows:

"October 14, 1946.

"E. E. Koch, Clerk,
United States Circuit Court of Appeals,
St. Louis, Missouri.

Dear Mr. Koch:

In Re: Caroline Thomson v. Freeman
J. Thomson, Administrator,
No. 13,330.

I have asked Martin J. O'Donnell, Esq. to aid me in the preparation of the petition for certiorari and supporting brief in the above entitled cause. His other engagements have been such that he has been unable to give me the necessary assistance in time to have the petition for certiorari and supporting brief filed in the Supreme Court of the United States within the time in which the mandate has been heretofore stayed.

Hence, I am sending you the enclosed motion, and respectfully request that you have same allowed, allowing 30 days additional time.

Very truly yours,
Harvey E. Hartz."

On October 22, 1946, the following order was made in said cause, caption omitted:

"Motion has been filed by appellee in this cause for a further stay of the issuance of the mandate for the period authorized by law in which to file a petition for writ of certiorari in the Supreme Court of the United States. Opposition has been filed by appellant.

The motion and opposition have been considered and it appears from the files in this cause that the petition and supplemental petition for a rehearing filed by appellee were denied on September 3, 1946, and on motion of appellee filed September 10, 1946, the issuance of the mandate of this Court was by order entered September 23, 1946, stayed for a period

of thirty days from and after said date, and that appellee had taken no steps to obtain necessary transcript of record from this Court for filing in the Supreme Court with a petition for writ of certiorari until October 19, 1946.

Therefore, It Is Ordered that said motion for further stay be, and is hereby, denied.

October 22, 1946.

Approved for the Court:

Kimbrough Stone,
Presiding Judge."

That thereafter, and on October 23, 1946, the senior Circuit Judge of the United States Circuit Court of Appeals transmitted the following letter to said clerk and to counsel for the parties:

"Kansas City, Mo., Oct. 23, 1946.

No. 13,330, Caroline Thomson, Appellant, v. Freeman J. Thomson, Administrator of the Estate of Arthur W. Thomson, Appellee.

E. E. Koch, Esq.
Clerk, U. S. Circuit Court of Appeals
St. Louis, Missouri

Dear Mr. Koch:

In the above case you were yesterday sent order denying further stay of mandate. It is my understanding from counsel this morning that they wish to apply to a Justice of the Supreme Court for further stay. To afford them such opportunity, I wish you would hold the mandate for two weeks until Thursday, November 7, 1946.

Sincerely yours,

Kimbrough Stone."

cc: Messrs. White & Hall,
Counsel for Appellant;
Mr. Harvey E. Hartz,
Counsel for Appellee."

That on October 24, 1946, the clerk of said court sent a letter to petitioner's counsel, which is in words and figures as follows:

"13330, Thomson v. Thomson, Admr. etc.

"St. Louis, Mo. 1

October 24, 1946.

"Harvey E. Hartz, Esq.,
304 Title & Trust Bldg.,
Kansas City, Missouri.

Dear Sir:

I am in receipt of your letter of the 23rd instant enclosing entry of appearance of Mr. Martin J. O'Donnell as counsel for appellee in the above case, which I have filed and entered, and this will be included in the transcript to be prepared for filing in the Supreme Court.

As requested I will also include in the transcript following the recent order of this Court denying motion for further stay of mandate paragraph (c) of our Rule 16.

When the transcript has been completed and the additional proceedings in this Court printed I will, as requested, send the certified transcript with ten completed copies of the record direct to the Clerk of the Supreme Court at Washington and will send you a complete copy for service on counsel for appellant with your petition for writ of certiorari and supporting brief. Will also send you several copies of the additional proceedings in this Court.

I also have a letter from Judge Stone this morning directing that mandate be held for two weeks until Thursday, November 7, 1946. This direction will be complied with.

Yours truly,

K/A E. E. Koch, Clerk."

Petitioner states that none of the completed copies of the record have been received by your petitioner or his counsel, and that for said reason it has been impossible to prepare the petition for certiorari and supporting brief, together with the facts set forth in the letter to the clerk of October 14, 1946, prior to November 7, 1946.

Your petitioner states that he has been advised by counsel that in the record and judgment of the United States Circuit Court of Appeals there is an error which should be reviewed and corrected by the Supreme Court of the United States on certiorari, and that in order to enable petitioner to have a petition for certiorari and supporting brief prepared, it is necessary that he be given the three months fixed by the Act of Congress in such case made and provided for the preparation and presentation of said petition for certiorari and supporting brief to the Supreme Court of the United States.

And your petitioner further states that in the said interpleader proceeding the sum involved, to-wit: $14,951.50 was deposited with the clerk of the district court, and is still in the possession of said clerk and subject to the control of the said District Court, and that if said sum be paid to said Caroline Thomson, pursuant to the mandate of the Circuit Court of Appeals, then, according to the information and belief of petitioner, said fund will be dissipated and can never again be subjected to the jurisdiction or disposition of the District Court.

That the United States Circuit Court of Appeals for the Eighth Circuit has formulated its Rule 16, subdivision (c) of which follows:

> "(c) Effect of Petition for Certiorari. If a stay of mandate be granted pending application to the Supreme Court for certiorari, such stay shall not exceed 30 days; Provided, that if, within such stay, there is

filed with the clerk of this court the certificate of the clerk of the Supreme Court that the petition for certiorari, record, and brief have been filed, such stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of that Court denying the writ, the mandate shall issue forthwith."

That said rule conflicts with the statute allowing three months and that its enforcement herein by the Circuit Court of Appeals will deprive this Court of jurisdiction to review the record on certiorari.

That said Circuit Court of Appeals, believing that it was its duty to give effect to said rule, notwithstanding the conflict between same and the Act of Congress as applied to the facts herein, denied petitioner's last motion for an extension of the stay of mandate.

That petitioner will need the full time authorized by the statute so as to enable him to have the petition for certiorari and supporting brief properly prepared, printed and filed.

Wherefore, Petitioner respectfully prays the Court that order issue to the said Circuit Court of Appeals that the mandate be stayed until it is notified by the clerk of this court that a petition for certiorari is on file in this court, or until the expiration of the time fixed by statute for presenting said petition to this Court, and that a copy of said order be transmitted to the Clerk of the United States Circuit Court of Appeals at St. Louis, Missouri, and another copy to the Clerk of the United States District Court at Kansas City, Missouri.

Harvey E. Hartz

Attorneys for Petitioner.

State of Missouri, County of Jackson, ss.

Harvey E. Hartz, being duly sworn, upon his oath states: That he is the attorney of record for Freeman J. Thomson, administrator of the estate of Arthur J. Thomson, deceased, in the cause mentioned in the above and foregoing motion.

That he knows of the matters and things therein stated, and that the statements made in said motion are true.

Harvey E. Hartz

Subscribed in my presence and sworn to before me this 31st day of October, 1946.

Thos. M. Hart,

(Seal)

Notary Public, Jackson County, Missouri.

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 689.

FREEMAN J. THOMSON, ADMINISTRATOR OF THE ESTATE OF ARTHUR W. THOMSON, DECEASED, PETITIONER,

VS.

CAROLINE THOMSON, RESPONDENT.

PETITIONER'S PETITION FOR A REHEARING.

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 689.

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PETITIONER'S PETITION FOR A REHEARING.

Now comes petitioner and respectfully prays that a rehearing be granted herein because:

The Court overlooked the consideration that an appellant in the Circuit Court of Appeals could not by a stipulation between counsel give said Circuit Court of Appeals jurisdiction to dispose of the case on a partial record of the evidence before the Trial Court. In *Bertke* v. *Hoffman*, 330 Mo. 584, l. c. 586, it is said:

> "Appellant's abstract of the record purports to give in about sixteen pages, chiefly in narrative form,

'all the evidence introduced in the entire case,' but it plainly shows that certain exhibits received in evidence have been omitted therefrom and even states that evidence was omitted therefrom because not 'pertinent to the points raised on this appeal.' It is for the court and not for appellant to determine whether the evidence is pertinent."

In *Stalcup* v. *Bolt*, 234 Mo. App. 1070, l. c. 1075, it is said:

"Although the record discloses a stipulation between counsel for plaintiff and defendant to the effect that the 'foregoing bill of exceptions is true and correct and contains all the evidence offered and introduced all the objections of counsel the rulings of the Court thereon * * *' an examination of the record discloses beyond the slightest doubt that parts of the evidence have been omitted from the abstract. For instance, none of plaintiff's testimony in chief appears in the abstract. The first line of plaintiff's evidence as set out in the abstract of the record, begins with the cross-examination of plaintiff. * * *. Even though the attorneys for the respective parties may have been of the opinion that the portion of the evidence abstracted, was all that had any direct hearing upon the questions raised in this appeal we cannot convict the trial court of error. * * * without an opportunity to determine for ourselves, from *all* the evidence whether or not the ruling was correct."

Also in *Maplegreen Realty Co.* v. *Trust Co.*, 237 Mo. l. c. 361, it is held:

"that appellate courts approach the facts in an equity case by allowing to the trial chancellor (in this case his referee) the primary advantage of a personal factor or equation, viz., the actual use of eye and ear in discerning the truth of witnesses (eye and ear filling a prime office in that regard), and in stamping testimony with its earned and deserved percentage of

> weight and credit. The upper may well defer to the lower court in that particular. Subject to that modification, an equity case is heard *de novo* on appeal. Therefore, if it cannot be heard *de novo* in all that term implies—*i. e.*, in very deed and truth—it should not be heard at all on appeal. * * * A court of conscience may, indeed, speak and act, but it must hear before it does either. Now to 'hear' and decide the merits of a case in equity, without the testimony, is a solecism."

It thus appears that an appellant cannot in Missouri give an appellate court jurisdiction to review the action of the trial court, either at law or in equity, by a record assertion with or without a stipulation of counsel to review the action of the trial court unless it includes all the evidence on the question to be reviewed.

The rule thus stated by the Missouri Appellate Courts was also announced by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Van Dusen,* 78 F. 2d 121, in which case the Court after citing decisions of the Ninth and Fourth Circuits and the decision of this Court in *Suydam* v. *Williamson et al.,* 20 How. 427, said (l. c. 122):

> "An appellate court must be controlled in its decision solely by the facts contained in the record. * * * In other words, deficiencies in the record may not be supplied by stipulations or statements of counsel or recitals in the opinion of the court from which the appeal is taken."

The Hon. Albert A. Ridge of the United States District Court bore the same relation to this case that the late Lord Bathurst bore to the case of *Sir John Eden, Bart., et al.* v. *The Right Honorable John Earl of Bute et al.,* VII Brown's Parliamentary Cases 204, 208, referred to on pages 7 to 10 of Petitioner's reply herein. The High Court of

Parliament held that a different record as to evidence could not be made for the appellate court because, if

> "on the hearing the appeal in this case from the Lord Chancellor's decree, the evidence on both sides was to be gone into, a case would be laid before the House, totally different from that which was before his Lordship."

Also this Court in the case of *Guaranty Trust Co.* v. *York*, 326 United States 99, held that (l. c. 104):

> "Congress provided that 'the forms and modes of proceedings in suits * * * of equity' would conform to the settled uses of courts of equity. Section 2 (May 8, 1792), 1 Stat. 275, 276, Ch. 36, 28 U. S. C. A. 723, 8 F. C. A., Title 28, 723. But this enactment gave the federal courts no power that they would not have had in any event when courts were given 'cognizance,' by the first Judiciary Act, of suits 'In equity.' From the beginning there has been a good deal of talk in the cases that federal equity is a separate legal system. And so it is, properly understood. The suits in equity of which the federal courts have had 'cognizance' ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery."

Had Judge Ridge's decision herein been rendered in the State Court, respondent could not on the record herein have had a trial *de novo* in any Missouri appellate court on the sole ground that a stipulation of counsel does not confer appellate jurisdiction when the record contradicts it.

This Court has held that a "substantive" or "procedural" State rule which in a state court would bar recovery by a litigant must be applied by the Federal Courts. This Court further said in *Guaranty Trust Co.* v. *York*, *supra* (108):

"Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."

Also since the Statute creating the circuit courts of appeal provided that such courts shall have appellate jurisdiction to review by appeal final decisions of the District Courts, but should have no original jurisdiction, it was, therefore, not the function of the Appellate Court in this case to assume the powers of the trial court. *Schilling* v. *Schwitzer Commission Co.*, 142 Fed. 82 (C. C. App. D. C.). Its function was wholly appellate. *Ins. Co.* v. *Nolty*, 130 F. 2d 675.

For the reasons above stated, Petitioner respectfully prays this Court for a rehearing in this cause.

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

Certificate of Good Faith.

We, Harvey E. Hartz and Martin J. O'Donnell, Counsel for Petitioner in this cause, do hereby state that the Petition for Rehearing in this cause is filed by us in good faith and not for delay and that we verily believe the same to be meritorious.

Harvey E. Hartz

Michael J. O'Donnell

Attorneys for Petitioner.